2001

Harold K. Beecher v. Salt Lake City Corporation : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

HAROLD K. BEECHER AND ASSOCIATES,
Plaintiff-Appellant,
vs.
SALT LAKE CITY CORP. AND SALT LAKE COUNTY,
Defendants-Respondents.

Case No. 13610

CORRECTED APPELLANT'S BRIEF

Appeal from Summary Judgment of Dismissal by District Court of Salt Lake County, Utah, Honorable D. Frank Wilkins, *Judge*

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STATEMENT OF THE CASE

Suit by architect for additional fees claimed to be owed for extra architectural services and expenses resulting from changes ordered by Defendants in the design and construction of the Metropolitan Hall of Justice complex.

DISPOSITION IN LOWER COURT

Court granted summary judgment dismissing Plaintiff's claims.

RELIEF SOUGHT ON APPEAL

Reversal of summary judgment of dismissal and remand for trial on the merits.

STATEMENT OF FACTS

Salt Lake City and Salt Lake County employed Beecher (plaintiff) as architect for the Metropolitan Hall of Justice Complex (R. 27 & 36), appointed the Salt Lake City Engineer as their representative and required that Beecher ". . . perform and conduct all required services under his direction and supervision . . ." (R. 32, Par. 13). Under the direction and supervision of the City Engineer Beecher for approxmiately 10 months prepared schematic and preliminary studies on the design of a proposed single high-rise building and had earned a fee to that point of about $120,000.00 (R. 286) when the Defendant (acting through a citizens' advisory committee) decided not to build a high-rise, to change the basic concept for the project (R. 286-289) and to start over. Beecher, who had been paid nothing to that point, was coerced by economic duress (in view of the large amount expended by Beecher on plans which were scrapped) into accepting a partial payment of $36,000.00 as a part of the total fee that Defendant had contracted to pay for the project. (R. 34, 45, 229, par. 11, 286, 293 and 298)

Construction time for the originally contemplated high-rise and also for the yet to be designed revised project was estimated at 730 calendar days (R. 49-50, 288, 289). After said abandonment of the original project and partial payment of architectural fees, Defendants decided to build the revised project in two phases and to defer construction of the Court Building portion until the first phase was completed so as to permit use of

the police building until the new police facilities were completed. This two-phase program resulted in actual construction time of 1736 days (R. 299), (approximately 2½ times the 730 days contemplated by the parties when they entered into the original and supplemental agreements) (R. 27 and 36).

The architect was required under the terms of the agreement to provide services during the entire construction period, and his claims result from the additional construction time and from changes ordered by the Defendants. The agreement included the following provision: (Portion of Paragraph #4 of Agreement)

> "EXTRA SERVICES AND SPECIAL CASES. If the Architect is caused extra drafting or other expenses due to changes ordered by the Owner, . . . *he shall be equitably paid for such extra expense and the service involved . . .*" (R. 29, 4).

Plaintiff's claims, which were dismissed by the Court, are for extra drafting and expenses resulting from changes ordered by the Defendants (Owners) within the meaning of said contractural provision, and are basically as follows:

> Item #1. (R. 47, 60-61) Claim for attending approximately 75 meetings with Citizens' Advisory Committee (contract named City Engineer as representative of Defendants [R. 32, par. 13] and requiring Plaintiff to attend said meetings constitutes extra work not contemplated by the contract [See

also explanation in Plaintiff's answer to Defendant's interrogatories]) (R. 238-240, par. #2).

Item #2. (R. 38 & 61). Claim for extra work resulting from preparation of new drawings to replace those abandoned by Defendants when Defendants changed the type of facility desired (after Plaintiff had worked for 10 months under the direction of Defendants' representative on the originally contemplated project.) (See also explanation in Plaintiff's answers to interrogatories — R. 229-230, Par. 1 & 12). The agreement provides in part as follows: (R. 29, Par. #4) (Portion of Paragraph #4 of Agreement)

> *"If any work designed or specified by the Architect is abandoned or suspended, in whole or in part, the Architect is to be paid for the service rendered on account of it."*

See also contractural provision for payment to Architect for extra work and expenses quoted on page 3 above and found at (R. 29 & 47).

Item # 3. Not involved in appeal.

Item #4. (R. 50 & 64-68) Claim for extra drafting and other expenses resulting from the later decision to build the project in two phases extended the construction period from the originally contemplated 730 days (R. 243, Par. 8, 267) to actual construction time of 1736 days. That decision to extend construction period was made well after execution of the supplemental agreements. (R. 36 and 45, 245, Par. 8 (j), 269.) (Accordingly plaintiff's claim could not have been waived by the supplemental agreement.)

Item #5. Not involved in appeal.

Item #6. (R. 53 & 68) Claim for extra work in connection with assisting in the defense of a taxpayer's lawsuit filed against Defendants herein in connection with awarding of bid for jail equipment contract. (See also R. 231, Par. 24, R. 239, Par. 2(f)).

Items #7 and 8. (R. 53-54, 69). Claims for space analysis survey and square foot analysis to determine space requirements to Defendants in connection with size of structure to be constructed and to determine portion of completed space occupied by each of the Defendants. This work was extra work not included in the contract between the parties. Defendants acknowledged that they were indebted to plaintiff for those services (R. 89-90, Par. 7 & 8) (The Court overlooked that admission of liability and improperly dismissed those claims).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT OF DISMISSAL.

Since disputed issues of fact exist which, if resolved in favor of Plaintiff, would entitle Plaintiff to recover against Defendants, the granting of summary judgment in this matter was improper. Summary judgment should be vacated and the case remanded for trial on the merits. *DAV v. Hendrixson,* 9 U. (2d) 152, 340 P.2d 416; *Hatch v. Sugarhouse Finance Co.,* 20 U. (2d) 156, 434 P. 2d 758.

The agreement between Plaintiff and the Defendants specified no time for construction of the project to be

designed by Plaintiff (R. 27, 36 and 45), however, the sworn answers to interrogatories filed by Plaintiff indicate that at the time of execution of the agreements the parties contemplated building a structure requiring a period of not to exceed two years (730 days) to construct. (R. 243, Par. 8). As a result of the later change to a two-phase project the actual construction time was 1736 days (R. 50 & 64), an increase of 1006 days. The bulk of Plaintiff's claims relate to extra work performed and extra expenses incurred by Plaintiff in performing professional services during the additional 1006 days construction period. The Court ruled that Plaintiff's claims were waived by the supplemental agreements (R. 34 & 45). The Court erred in that determination. The following issues of fact exist which are in dispute and require testimony and evidence at a trial, thereby precluding the granting of summary judgment:

1. UNDISPUTED CLAIMS IMPROPERLY DISMISSED.

Plaintiff's claim (items #7 and 8) for extra compensation for space analysis and square foot analysis (R. 53-54, 69) (see page 5 above) are not disputed by Defendants who have acknowledged liability therefor. See letter of Feb. 4, 1970, (R. 89-90, par. 7 and 8) wherein Jack L. Crellin, City Attorney, recommends to the Salt Lake City and Salt Lake County Commissions that those claims be allowed. The Court odviosuly overlooked Defendants' admission of liability in granting summary judgment dismissing those claims. If Defendants now dispute items #7 and 8 then an issue of fact

exists which requires a trial to determine whether or not Plaintiff is entitled to be paid for that extra work. The record is wholly devoid of any affidavits, admissions, pleadings, etc. which would justify summary judgment of dismissal, particularly in view of rule concerning summary judgments to the effect that for purposes of such a motion plaintiff is entitled to have the court survey the evidence and all reasonable reference fairly to be drawn therefrom in the light most favorable to Plaintiff. *Thompson v. Ford Motor Co.*, 16 U. (2d) 30, 395 P.2d 62.

2. TWO-PHASE CONSTRUCTION DECISION CONSTITUTES A CHANGE ORDERED BY THE OWNERS.

Since the later decision by the Defendants to construct the project in two parts or phases was made well after the parties entered into the supplemental agreements (R. 34 and 45), execution of those agreements could not constitute a waiver by Plaintiff. Plaintiff has a right to recover additional compensation, under the terms of the agreement, for extra services furnished at the request of the Defendants. If Defendants dispute the fact that the decision to build in two phases was made after the execution of the supplemental agreements, then an issue of fact remains to be tried with respect to when the project was changed from a single phase project to a two-phase project. See also discussion on page 6 above and R. 50 & 64, paragraphs #4; Plain-

tiff's answers to interrogatories, (R. 243, Par. 8); also see discussion in memorandum to the Court, R. 263-278. Issues of fact remain for trial as to whether or not after the parties had entered into the agreements employing Plaintiff, including the supplemental agreements, the Defendants changed the project from one which contemplated a construction period of 730 days to one requiring a construction period of 1,736 days, and whether or not said change by the defendants constituted extra work for which Plaintiff is entitled to be compensated within the meanings of paragraphs # 4 and 7 of the agreement between the parties (R. 29, Par. #4; R. 30, Par. #7. See page 13 hereof). The agreement between the parties is silent as to the time contemplated for construction of the project and accordingly is ambiguous in that regard so parole evidence is admissable to establish the intent of the parties as to the contemplated construction period for the project. *Continental Bank & Trust Co. v. Bybee,* 6 U. (2d) 98, 306 P.2d 773; *Spitz v. Brickhouse,* 123 NE 2d 117, 49 ALR2d 673; *Hite v. Aydlett,* 132 SE 149; *Svarz v. Dunlap,* 235 P. 801, 271 P. 893; *Stacy-Judd v. Stone,* 12 P2d 143; *Mitterhausen v. S. Wisc. Conf. Asso.,* 14 NW 2d 19; *Parsons v. Briston Dev. Co.,* 402 P. 2d 839; 5 Am Jur 2d Architects Sec. 19, P. 682 and cases there cited. There is probably no better evidence of the intention of the parties to build a single bulding of one-phase construction than the fact that Beecher, under the direction of the agent for the Defendants, worked for 10 months on a single phase building project (R. 229 & 230). See *Trucker Sales Corp. v. Potter,* 104 U. 1, 137 P. 2d 370.

3. SERVICES IN TAXPAYER'S LAWSUIT ARE EXTRA SERVICES.

Issues of fact remain for trial as to whether Plaintiff is entitled to recover for additional services furnished by Plaintiff at the request of Defendant in connection with a lawsuit filed against Defendants by a taxpayer contesting the awarding of the jail equipment Contract, and whether or not those services were included in the duties of Plaintiff under the terms of the original agreement, or whether Plaintiff for some other reason is not entitled to recover for those services. The record is devoid of any affidavits, admissions, pleadings or other documents which would support summary judgment of dismissal of this claim. (R. 53 & 68; R. 231, Par. 24 [answers to requests for admissions]; R. 239 last par.) See also discussion on page 5 above.

4. SUPPLEMENTAL AGREEMENTS DO NOT BAR PLAINTIFF'S CLAIMS.

An issue of fact remains for determination as to whether or not execution of the supplemental agreements (R. 36 & 45) constitutes a bar to Plaintiff's claim for extra work and expense in re-designing the Metropolitan Hall of Justice project from a single building to the present multiple building arrangement. (R. 47-48; 60-63; sworn answers to requests for admissions R. 299-230; sworn answers to interrogatories R. 239). Testimony is required to determine the intent of the parties with respect to whether or not early payment of $36,-000.00 on the fee (to which Plaintiff was already entitled under its agreement with Defendants) was intended to

constitute a waiver of Plaintiff's claim for extra work in re-designing the project after abandonment of work that was partially completed at the time that Defendants changed the type of structure which they desired.

(a) *Supplemental agreements contain no waivers by Plaintiff.* If the supplemental agreements (R. 36 & 45) do not waive Plaintiff's right to collect for said extra work, Plaintiff is entitled to be paid therefor under the terms of paragraphs #4 and 7 of the agreement quoted on pages 3, 4 and 13 herein (R. 29, Par. #4 and R. 30-31, Par. #7). See also *Fitzgerald v. Walsh,* 107 Wis 92, 82 NW 717. An analysis of that agreement reveals that the Defendants simply waived the requirement of prior approval by their Boards of Commissioners of work done to that date (because that work was being abandoned due to change of type of structure desired by Defendants), and therefore Defendants agreed to pay $36,000.00 toward the total architectural fee for the entire project earlier than it was otherwise due. (R. 29, Par. #5). This was reasonable in view of the fact that Beecher had worked for almost 10 months and expended large sums of money working on the plans that were abandoned. The parties agreed that the value to the Defendants of the services rendered to that time was $36,000.00, (R. 34, Par. 2 and R. 45, Par. 2); that the original agreement would remain in full force and effect; that the waiver of prior approval of work by respective Commissions of Defendants applied only to that single payment and that said payment constituted full payment for all services to November 10, 1960. There is absolutely

nothing in that agreement which precludes Plaintiff from asserting a claim for extra drafting and other expenses incurred after November 10, 1960, in re-designing the project using the new concept developed thereafter. Defendants are the ones who changed the type of structure which they desired and Defendants should be required under paragraphs #4 (see pages 3 and 4) and 7 (see page 13) of the agreement to pay for those changes. (R. 29-31).

Plaintiff was coerced (R. 229) into accepting $36,000.00 at that time rather than approximately $120,000.00 claimed by Plaintiff to have been earned to that date when the work being done was abandoned (R. 286).

(b) *Supplemental contracts void for lack of Consideration.* Since the failure of the Defendants to approve the work done by Plaintiff under the direction of Defendants' representative was not due to any default by Plaintiff, but was solely the result of Defendants changing the type of structure which they wanted, the unilateral decision of Defendant not to approve that work is insufficient consideration to support the supplemental agreements; the $36,000.00 had already been earned and was payable for abandonment of work done by Plaintiff as provided by paragraph #4 of the agreement (R. 29); accordingly said partial payment of fees already earned is not consideration which would support the supplemental agreements; therefore said supplemental agreements are simply not supported by consideration and are void and unenforceable. Defendants cannot any more avoid payment for services rendered by Plaintiff by refusing to approve work done under the di-

rection of Defendants' designated representative than an owner could avoid payment to a contractor because an architect wrongfully failed to approve work that had been satisfactorily done. Plaintiff has not been paid a single cent for the extra work caused by abandonment by Defendants who now seek to construe the supplemental agreements as agreements that Plaintiff was in essence making a gift to Defendants of 10 months work and to thereby prevent Beecher from being paid for redoing work done in good faith and abandoned through no fault of Beecher. A fair reading of the supplemental agreements leads to the conclusion that Defendants simply didn't want to pay more than the $36,000.00 for the abandoned work, which obviously was worth many times that amount. Had Defendants intended that no claim be made for extra work in bringing the work on the revised project to the same point as the work on the prior project when the abandonment occurred, they would have said so in the supplemental agreements. Those agreements were drafted by the Defendants and any ambiguity therein should be construed most strongly against the Defendants. *Skousen v. Smith,* 493 P. 2d 1003, 27 U. (2d) 169; *Seal v. Tayco, Inc.,* 400 P. 2d 503, 16 U (2d) 323; *Huber & Rowland Const. Co. v. City of South Salt Lake,* 323 P. 2d 238, 7 U. (2d) 273; *Wingets, Inc. v. Bitters,* 500 P. 2d 1007, 28 U. (2d) 231.

Aided by this presumption and rule of construction, the meaning of the supplemental agreements (R. 36 & 45) is uncertain and require testimony and evidence to determine if Plaintiff's claim for extra compensation for re-designing and re-drafting of the new project after

execution of the supplemental agreements is barred by the terms of those agreements and, if so, whether or not those agreements are enforceable in view of Plaintiff's claim of economic coercion in inducing the execution of those agreements and claim by plaintiff that the agreements are not supported by consideration. (R. 229, Par. #11, sworn answers to requests for admissions and R. 284-309).

5. PLAINTIFF IS CONTRACTUALLY ENTITLED TO BE PAID FOR ADDITIONAL EXPENSES.

Plaintiff was unable to perform the work contemplated under paragraph #7 of the agreements during the construction period with a single inspector because of the spread out nature of the re-designed project and was required to use additional employees throughout the construction period (R. 244, Par. 8 (e)). Plaintiff was also required to maintain an office staff to work on Defendants' project during the entire 1736 days construction period for which Plaintiff has not been reimbursed. Paragraph #7 of the agreements between Plaintiff and Defendants (R. 30-31) provides in part as follows:

> "The architect shall furnish at his expense a qualified on-site inspector . . . during the entire time the construction work is in progress, whose duties shall consist of checking all shop drawings . . . to determine the quality and acceptance of the material and/or equipment proposed to be used in the facilities being constructed; to supervise and inspect all phases of the work being done."
>
> The costs, to be paid by the Architect for the above services to be rendered, shall not exceed

> $15,000.00. *In the event these services exceed this amount, it is hereby agreed by all concerned that the owner shall assume all costs in excess thereof."* (emphasis added).

Defendants paid the additional costs applicable to one of the inspectors who supervised construction, but have refused to pay the cost of additional employees hired by Plaintiff to perform a part of the work specified in paragraph #7 (which simply could not be done by a single man), and have refused to pay the additional expenses incurred by Plaintiff as a result of the job being extended for over 1000 more days than was contemplated by the parties at the time that they executed the various written agreements (including the supplemental agreements R. 36 & 45).

Defendants argue that the limit of their liability under the agreements paragraph #7 (quoted above) is payment for a single inspector. Since the parties did not contemplate the additional 1,000 day construction period paragraph #7 is ambiguous as to what expenses were intended to be paid thereunder. Since Defendants drafted the agreements they should be construed most strongly against Defendants. (See cases cited on page 12 above). The dispute as to the expenses to be paid by Defendants under the language used in paragraph #7 of the agreements, particularly when construed with the language of paragraph #4 thereof, (see page 4 above) requires a trial and production of testimony and evidence, and precludes the granting of summary judgment.

SUMMARY

Suit by architect for additional fees and expenses claimed to be owed for extra work ordered by Salt Lake City and Salt Lake County in connection with design and construction of Metropolitan Hall of Justice project. Architect worked for approximately 10 months under the direction of the representative of Defendants designing a single high-rise building, then Defendants required that those drawings be abandoned and instructed the architect to design the present multiple-building facility. Defendants at that time waived the contractural requirement of prior approval by City and County Commissions of work done and made a partial payment to Architect on the total Architectual fee due under the original agreement, the parties agreeing that the amount paid was in payment for work done to that date.

Court granted summary judgment at pre-trial dismissing Plaintiff's claims for extra fees on theory that said partial papment was a waiver by Plaintiff of right to collect for extra work done thereafter. Plaintiff claims to be entitled to payment for that extra work under provisions of Paragraphs #4 and 7 of the agreement between the parties. No affidavits were filed by Defendants in support of their motions for summary judgment. Contested issues of facts remain unresolved which must be tried, which if resolved in favor of Plaintiff would entitle Plaintiff to judgment against Defendants, including:

A. Plaintiff's claims for extra compensation for space analysis and square foot analysis (R. 53-54, 69,

par. #7 and 8) (which are not disputed by Defendants but which were erroneously dismissed by the court) (R. 89-90, par. #7 and 8).

B. Decision by Defendants to construct project in two parts (which resulted in extending construction time in excess of 1,000 days more than contemplated by parties at time of the agreements between Plaintiff and Defendants) was made well after execution of supplemental agreements which Defendants claim is a waiver of Plaintiff's right to be paid for extra expenses and services for that extra 1,000 days of construction time. If Plaintiffs claim is accurate the supplemental agreements could not be a waiver to a decision not yet made. If Defendants deny that said decision was made later, then an issue of facts exists which must be resolved by trial, thereby precluding summary judgment. This item constitutes the largest of Plaintiff's claims.

C. The record contains no admissions or affidavits which support summary judgment dismissing Plaintiff's claim for extra compensation for services furnished by Plaintiff in connection with Defendants' defense of a taxpayer suit involving the award of the jail equipment contract. An issue of fact remains for trial as to whether or not Plaintiff is entitled to be paid for those services.

D. The supplemental agreements are ambiguous as to whether or not their terms preclude Plaintiff from asserting a claim for re-drafting of abandoned drawings

using the new project concept, which ambiguity should be most strongly construed against Defendants since they drafted the instruments. Those agreements simply waive conditions precedent to payment of a part of the architects fee and fix the value of the services rendered to that date. Nothing in those agreements preclude Plaintiff from asserting the claims asserted in this lawsuit. A trial is necessary to resolve that ambiguity.

E. The consideration recited in the supplemental agreements is that of waiver of approval of work by City and County Commissions, which approval obviously would not be given since the drawings had been abandoned as the result of Defendants changing type of facility which they desired. The agreements recite that the work done was worth the amount paid and Plaintiff is entitled to payment therefore under paragraph #4 which requires Defendants to pay for designs and specifications which are abandoned. (R. 29, Par. #4). Accordingly a dispute of fact exists as to whether or not there is consideration to support said agreements or whether they are void for lack of consideration (R. 229, Par. #11). This dispute precludes the granting of summary judgment and makes a trial necessary.

F. A dispute which requires a trial exists with respect to the right of Plaintiff to recover under paragraph #7 of the agreements (R. 30-31, Par. #7) for expenses and services furnished during the construction period. Defendants claim that Plaintiff can collect for only a single employee. Plaintiff claims that it is entitled to be paid for all expenses incurred by it in performing the

services required under paragraph #7 (found on page 13 above), the performance of which required the services of more than the single employee, because of the spread-out revised project.

It is respectfully submitted that the Court erred in granting summary judgment dismissing Plaintiff's complaint and that the judgment of the lower court should be vacated and the case remanded for trial on the merits.

Respectfully submitted,

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